Supreme Court, U.S.
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No. 91-1499

In the
Supreme Court of the United States

October Term, 1991

DAVID A. JONES And CATHERINE M. JONES,
Petitioners,

v.

MELLON BANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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April, 1992

Petitioners, David A. Jones and Catherine M. Jones hereby **reply** to the Respondent's Brief in Opposition to their Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, as follows:

I. PETITIONERS' REPLY TO RESPONDENT'S COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Petitioners, [hereinafter "the Jones"] paid each and every installment on their mortgage to Mellon Bank, N.A. **when due or BEFORE** the installment became due.

The statement that "Petitioner, David A. Jones, admitted under oath that Petitioners failed to make all of their requisite mortgage payments when due" [Mellon Br. in Opposition at 2,n.1] is but half-true: over eleven (11) years, most of the installments were paid when due; some $9,000. thereof were made before these installments came due.

No prejudgment **evidentiary** hearing was

conducted prior to when "Judgment" against the Jones was entered by summary judgment. The oral arguments referenced by Mellon Bank [Br. in Opposition at 3 and 3,n.2] are **not** evidentiary hearings in any sense of that Due Proces Concept.

Mellon Bank's statement that the Jones filed a cross-motion for summary judgment "after" the lower court granted Mellon's motion for summary judgment is a bald face **lie**: the Jones filed this cross-motion on August 30, 1990, fourteen (14) days before summary judgment was entered in favor of Mellon Bank on September 12, 1990. [See Mellon Br. in Opposition at 3].

The Jones are unaware that any "formal hearing" was conducted prior to the denial of their cross-motion for summary judgment on October 26, 1990 as Mellon Bank contends [Br. in Opposition at 3,n.2] but, even if this were true, it does not alter the fact,

undisputed by Mellon Bank, that no "formal" hearing was conducted prior to September 12 when summary judgment was entered against the Jones. It would seem axiomatic that Due Process required such a "formal" hearing to occur before summary judgment was entered against the Jones, if in fact a "formal" hearing was held prior to when the lower trial court ruled on the Jones cross-motion for summary judgment against Mellon Bank.

Mellon Bank's statement that the Jones "initiated no discovery" [Br. in Opposition at 3] is false. The Jones filed and served interrogatories on Mellon Bank and moved to compel answers to the same when Mellon Bank ignored these interrogatories.

II. PETITIONERS' REPLY TO RESPONDENT'S REASONS FOR DENYING THE PETITION FOR WRIT

A. Petitioners Have Identified Special And Important Reasons To Justify A Writ Of Certiorari Under Rule 10.1.

This case involves the foreclosure of a mortgage by a Federal bank. The mortgagor Petitioners have alleged the denial of Due Process of Law under the Constitution of the United States of America, Federal case law and Federal statutes. These are issues arising under the Federal Constitution.

Mellon Bank has adopted the posture that the Petitioners' being "denied due process of law by not receiving a jury trial is **ridiculous**" [Br. in Opposition at 4 (emphasis added)], but that has never been the posture of this Court and, hopefully, never will be. This question by itself is of major constitutional as well

as public policy importance, sufficient to justify issuance of a Writ of Certiorari under Rule 10.1.

Nor is the question merely whether "a trial by jury is required or permitted **following** the entry of summary judgment" as Mellon Bank represented [Br. in Opposition at 5 (emphasis added)], but whether in the foreclosure of a Federal bank's mortgage a jury trial is required to determine whether the mortgagor Petitioners paid the mortgage according to its terms. Obviously, if a jury trial was required, it was required to be held **before** entry of summary judgment. A question of immense social importance exists as to whether the "Petitioners' claim that they were entitled to a jury trial is simply incorrect." [See Mellon Br. in Opposition at 5].

The misstatements of fact are not made by the Petitioners but by Mellon Bank. The

deposition testimony of Petitioner David A. Jones "admitted under oath" that monthly payments of principal and interest owed to the mortgagee were not paid in the month due [Mellon Br. in Opposition at 5] because these installments were paid **ahead** of when they were due, a fact question for a jury.

Mellon Bank has conceded within its Br.in Opposition at 6 that the "appropriate party to bring the mortgage foreclosure action" is the entity that "owns" the loan. Yet, long prior to the entry of "judgment" in this case the mortgagor Petitioners had received a **notice** that Mellon Financial Services Corporation Number Nine had become the **first mortgagee** on the subject loan. If true, this fact defeats the legal standing of Respondent Mellon Bank to bring the instant action. Whether this is true is a question of fact necessitating jury trial.

Respondent Mellon Bank concedes in its

Brief in Opposition at 6 that the successor to Mellon Financial Services is **Mellon Mortgage Corporation**. Petitioners ask this Court to note the cover of Respondent's Br. in Opposition where, at the top thereof, the following words are contained: "BRIEF-JONES/MM." Petitioners suggest that these words, apparently accessing the word processor from which that brief was printed document further that the real party in interest in this action is **Mellon Mortgage** or "**MM**" and not Respondent Mellon Bank, N.A.

Petitioners were unaware until reading Respondent's Br. in Opposition [at 7,n.4] that Respondent "was the successful purchaser" of the mortgaged premises at a sheriff's sale. Hardly can that fact "moot" the issues before this Court, however, as Petitioners had to exhaust their state remedies prior to bringing this Petition.

Petitioners urge this Court to note

that nowhere within its Br. in Opposition does Respondent controvert Petitioners' allegation that the lower trial court "judgment" for which review is sought in this Petition "awards" Respondent attorneys' fees far in excess of the five percent (5%) cap placed thereon by terms of the mortgage note drafted by Respondent. This is the most important policy issue raised in the Petition for Certiorari, alone justifying the issuance of that Writ, and possibly mandating summary reversal of the "judgment" below. 1/

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1 Incredibly, Respondent commenced another action against Petitioners on January 15, 1992, this new action seeking $29,825.60 in attorneys fees resulting from the mortgage foreclosure in this Action, notwithstanding a clause in the mortgage note limiting such attorneys'fees to a maximum of five percent (5%) of the outstanding balance due under the mortgage. Five percent (5%) of the original mortgage would be a mere $4,240. Respondent has argued in its new action that Petitioners are barred from contesting the amount of attorneys' fees demanded by

B. The Decisions of the Pennsylvania Courts Conflict With Decisions Of This Court.

Respondent's observation that the "present action ... involves a postjudgment foreclosure sale of mortgaged property" [Mellon Br. in Opposition at 7 (emphasis added)] rather than prejudgment attachment of the real estate hardly buttresses the argument that this action is inapposite to Connecticut v. Doehr, ___ U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991). If a mere prejudgment attachment requires an **evidentiary** hearing under Doehr, how much more important to Due Process must be the need for the same safeguard prior to either a foreclosure judgment or a postjudgment sale of mortgaged property.

Respondent under the doctrine of collateral estoppel by the "judgment" in this Action, further underscoring importance of this case.

Petitioners never received an evidentiary hearing, before or after entry of the "judgment" they ask this Court to review, just as Petitioners were denied a jury trial on the several genuine issues of fact they raised before the lower trial court, such as how many mortgage installments they prepaid, and whether they were supposed to pay their installments to Respondent or its assignee, now Mellon Mortgage Corporation.

The decisions of the Pennsylvania courts in this case were incorrect and repugnant to Federal law, including the Federal Fair Debt Collection Practices Act, §§ 801-817 of the Federal Truth-in-Lending Act, 15 U.S.C. §1601 et seq., because the Petitioners never promised to pay Respondent attorneys fees greater than five percent (5%) of their outstanding debt under the subject mortgage. Obviously, the

Pennsylvania court decisions are not "well reasoned" nor do they "rest exclusively on independent nonfederal grounds" as the Respondent wants this Court to believe. [Br. in Opposition at 9]. Petitioners have preserved their Due Process objections from the commencement of this Action before the lower trial court. No "waiver" occurred.

"Notice" is different from service of a summons and complaint. Petitioners deny having been properly served in this Action, a denial that has violated their Federal Due Process and Equal Protection entitlements.

Respectfully submitted,

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